Supreme Court, U.S.
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No. 00 655

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

KARIM KAMAL, on Behalf of Himself and Lauriane Kamal,

Petitioner

v.

CITY OF SANTA MONICA AND MICHAEL SMITH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether due process is violated when local police officers seize, without a warrant, a five year old French child in her father's custody and forcibly return her to her mother and French government officials based upon a French civil custody decree, obtained as a result of racial and religious prejudice, without affording the father notice or an opportunity to be heard in a court in this country, before or after the seizure, and without the issuance of any order by a Court in this country authorizing the seizure or change in custody.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings of this case are as follows: Petitioner Karim Kamal, Dalila Kamal-Griffin, Robert Griffin and Lauriane Kamal are the plaintiffs. Respondents City of Santa Monica, Respondent Michael Smith, James Butts, Richard Tapia, Kathryn Brock, City of Los Angeles, Gilbert Sandoval, Elva Bufford, Ministeres des Affaires Etrangeres De France, Alain Juppe, Jean Maurice Ripert, Theirry Zarella, Minister De La Justice De France, Pierre Mahaignerie, Paul Louis Aumeras, Rene Solomon, Francois Thevenot, James Orendorf, Marie Pierre Guyot, Pierrette Toche-Holbron, J.A. Elliot Boswell, Jean-Pierre Zarelli, Gilbert Alexandre, Jacqueline Alexander, Jerome Champagne and the Republic of France are Defendants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karim Kamal, on his own behalf and as Guardian Ad Litem for his daughter Lauriane Kamal, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, 1a-8a) is unreported. The District Court's Order Granting Respondents' Motion for Partial Summary Judgment concerning Petitioner's due process claims (App. infra, 9a-40a) is unreported. The District Court's unreported final judgment is set forth in the Appendix at 41a-43a. The Court of Appeals' decision denying Petitioner's Petition for Rehearing and Suggestion for rehearing En Banc is set forth in the Appendix at 44a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 2000. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on June 7, 2000, after having been given an extension of time to do so, which was denied on June 23, 2000. App. infra, 44a. This Court granted petitioner an extension of time to up to and including October 21, 2000, to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(i).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States requires, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

This case arises out of the warrantless seizure of a five year old child, Petitioner's daughter Lauriane Kamal[1], by officers of the Santa Monica Police Department, including respondent Smith, in June 1994. Lauriane Kamal, was brought to the United States by Petitioner, because she was being sexually and physically abused when in her mother's custody and because efforts to redress these harms were rebuffed by French courts based on blatant racial and religious prejudice against Petitioner because of his Arab ethnic background. The evidence of child abuse was confirmed by medical experts in the United States. One of the experts file a report of suspected child abuse with California authorities.

Upon entering the United States in the spring of 1994 Petitioner filed asylum petitions with the Immigration and Naturalization Service ("INS")[2] for himself and for Lauriane and informed federal and local law enforcement authorities about Lauriane's presence in the United States and about the pending asylum proceedings.

Instead of initiating proceedings in the California courts to dispute Petitioner's custody over Lauriane, Lauriane's mother enlisted the assistance of the Santa Monica Police Department ("SMPD") in seizing Lauriane without any notice to Petitioner or any hearing of any kind before a California court. This seizure also circumvented the pending asylum petitions filed by petitioner for himself and Lauriane..

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[1] Petitioner was appointed as Guardian Ad Litem for Lauriane Kamal by the district court at the outset of the action.

[2]Petitioner's asylum proceeding is still pending.

On June 21, 1994, Respondent Smith, with other SMPD officers, came to the home of Petitioner's sister, Dalila Kamal-Griffin,[3] and seized Lauriane without a warrant. Smith based this action on a French civil divorce decree which indicated that Lauriane could not be taken out of the European Union countries. This decree was never reviewed by a California court to determine whether it should be enforced prior to the seizure. Not only did Respondent Smith seize Lauriane without a prior hearing or order issued by a California court, but Smith also handed Lauriane over to her mother, defendant Guyot, and waiting French government officials before Petitioner could obtain a court hearing to challenge this warrantless and orderless seizure. Within days Lauriane was taken back to France surreptitiously despite a federal court order preventing anyone from transporting Lauriane out of the United States pending a final resolution of whether Lauriane should be allowed to leave the United States. On June 22, 1994, a California state court ordered that temporary custody be given to Petitioner pending further orders concerning who should have custody over Lauriane and whether she was in need of protection; However, this order was rendered ineffective by Lauriane's secret departure from the United States. Petitioner has not seen Lauriane since June 21, 1994.[4]

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[3] Ms. Kamal-Griffin and her husband Robert Griffin were also plaintiffs in the District Court. They each obtained judgments below which have been affirmed on appeal. Petitioner also obtained a judgment against two of the SMPD officers who made the warrantless entry into the Kamal-Griffin home on June 21, 1994. The judgment in favor of Petitioner was affirmed by the Ninth Circuit. App 7a.

[4] These events were excluded from the trial and Petitioner's claim for damages based upon the District Court's summary

Petitioner filed this federal action after it was discovered that Lauriane had been secreted out of the country. The action included numerous claims for damages against respondents and other defendants. After several years of pre-trial discovery and the dismissal of several of the original defendants, Petitioner went to trial on his remaining constitutional claims arising out of the warrantless entry into Petitioner's sister's home. Petitioner received a verdict in his favor against respondent Smith. This verdict was affirmed by the Court of Appeals. App7a. However, the judgment Petitioner obtained against respondent Smith was limited to the damages Petitioner suffered in the course of the illegal entry into the Kamal-Griffin home on June 21, 1994, and did not include any claims for the loss of Lauriane as a result of respondents actions.

Prior to trial, the District Court granted summary judgment against Petitioner on his due process claims arising under the Fourteenth Amendment based upon the seizure of Lauriane without either prior or subsequent notice or a hearing. Petitioner claimed that such notice and a hearing was required by due process before his physical custody over Lauriane could be terminated in this manner by the state. Petitioner also introduced voluminous evidence that the French court proceedings leading to the issuance of the French decree relied upon by the SMPD were permeated with racial and ethnic prejudice and did not comport with basic standards of due process. However, the district court determined that because Petitioner had been physically present in the legal proceedings in France concerning custody over Lauriane, notwithstanding this evidence, Petitioner received all of the due process he was entitled to. App.25a-26a.

Judgment ruling that the French Decree was "valid and enforceable" by local police without any further process or notice to Petitioner.

The Ninth Circuit affirmed based upon the District Court's alternative holding the individual SMPD officers were entitled to qualified immunity. App2a. The Ninth Circuit did not address the District Court's holding that the French decree was "valid and enforceable."

The central point in the context of this Petition, though, is that both the Ninth Circuit and the District Court accepted the principle that there was uncertainty about the necessity of providing a father in Petitioner's position with notice and a hearing before seizing a child and allowing the child to be removed to another country. This central holding is at odds with the Court's established due process jurisprudence and the case law of the federal courts in other Circuits and should not be allowed to stand.

REASONS FOR GRANTING THE WRIT

The decisions below pose a grave threat to children, especially children at risk who are seeking to avoid physical or sexual abuse, or who have come to the United States to seek asylum. Under the rulings below, local law enforcement officials may act without any judicial supervision in deciding to enforce foreign custody decrees, even when such actions conflict with pending asylum petitions or our government's obligations under international treaties.

Although there are detailed statutory procedures for obtaining custody over children allegedly brought to the United States improperly and for adjudicating conflicting claims in this context, in this case the Ninth Circuit affirmed self-help actions that utterly circumvented these established procedures and authorized actions that trampled on Petitioner's rights and have returned his daughter to an abusive environment. This Court should grant the Petition in Order to ensure that due process rights are respected in this sensitive matter.

I. The Ninth Circuit's Failure To Find That Petitioner Has a Clearly Established Right To Due Process In The United States Before His Child Could Be Seized By Police Officers Resulted In a Decision Which Conflicts With Decisions Of This Court, The Ninth Circuit And Other Circuits.

The Ninth Circuit affirmed the District Court's summary judgment order on qualified immunity grounds based on the reasoning that the police officers were in possession of a French court order that had been registered in a California state court[5] and that the officers had been told by a deputy district attorney that the order was enforceable. *App.2a.*[6] The District Court had actually ruled against Petitioner on the grounds that the French custody order was "valid and enforceable" as a matter of law because Petitioner had been present during the French proceedings and that was all

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5 "Registration" involves only the filing of a certified translation of the French order with the court. It does not involve any hearing on the validity of the court order and there was no hearing into the validity of the French order that was registered in the Los Angeles Superior Court in this case.

6 The Ninth Circuit did not consider whether the City of Santa Monica was liable under a *Monell* theory for the violation of Petitioner's due process rights in its decision. Petitioner raised this point in his Petition for Rehearing but this Petition was denied without any discussion of this issue. App44a. Under this Court's cases, the Ninth Circuit should have examined whether the due process rights Petitioner asserts herein were clearly established before deciding the qualified immunity issue upon which its decision is based.

the due process Petitioner was entitled to in the United States before his child could be seized without a warrant and taken to France. *App26a.*[7] The District Court did rely upon qualified immunity as an alternative ground for decision. *App.27a.*

This Court's cases have clearly established that a parent cannot be deprived of the physical custody over his child without notice and an opportunity to be heard. *Stanley v Illinois*, 405 U.S. 645, 649-58 (1972); *Lassiter v Department of Social Services*, 452 U.S. 18 (1981); *Quilloin v Walcott,* 431 U.S. 246 (1978). In this case, SMPD officers seized Lauriane Kamal from her father's physical custody, in fact from his arms, without notice or a hearing before a court in this country.

This well established principle has been applied in a wide variety of circumstances by courts within and outside the Ninth Circuit. For example, in *Robison v Via,* 821 F. 2d 913, 921 (2d Cir. 1987), the Second Circuit found that the plaintiffs due process rights were violated when the police took custody over plaintiffs' children without a predeprivation hearing. Similarly, in *Anderson v Roberts*, 659 F. Supp. 19 (C. D. Cal. 1986), a police officer was found liable for removing a child from his father's physical custody without a prior order from a California court, based on the request of the child's mother. In *Smith v Eley,* 675 F. Supp. 1301 (D. Utah 1301), the court affirmed that the police cannot intercede on behalf of one parent over another in a custody dispute without a court order. *See also, Hurlman*

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As Petitioner argued in the Ninth Circuit, the District Court should not have determined the validity of a French custody decree. This was always a matter for the California courts and federal courts should not have intervened in such determinations at any point. *See Vaughan v Smithson,* 883 F. 2d 463, 464 (9th Cir. 1983).

v Rice, 927 F. 2d 74 (2d Cir. 1991); *Huffordv Rodgers,* 912 F. 2d 1338 (11th Cir. 1990); *Dennison v Vietch,* 560 F. Supp. 435, 440-42 (D. Minn. 1983).

The principles in these cases are also found in numerous cases interpreting the Uniform Child Custody Jurisdiction Act ("UCCJA"). The California Family Code, which incorporates the UCCJA, explicitly provides that foreign custody decrees will not be enforced unless all parties have notice and a hearing as to whether the foreign decree meets all UCCJA standards. Cal. Family Code sections 3404, 3413 and 3424. *See also In re Hopson,* 110 Cal. App. 3d 884, 893-94, 168 Cal. Rptr. 345 (1980); *Miller v Superior Court,* 22 Cal. 3d 923 (1978).

The cases in state courts requiring notice and a hearing in UCCJA cases before a foreign custody decree is enforced in the United States are legion. *See, e.g. In re Marriage of Paraskevas Agathos and Diamando Bakatselos,* 194 Ill. App. 3d 168, 550 N.E. 2d 1161 (1990); *Mitchell v Mitchell,* 437 So. 2d 122, 125 (Ala. 1982); *Holm v Smilovitz,* 840 P. 2d 157, 163 (Utah 1992); *Wyatt v Fahlsing,* 396 So. 2d 1069, 1073 (Ala. 1981). These cases reflect the fact that the principles of due process embodied in this Court's cases and the other cases cited above have been fully incorporated into the UCCJA case law and no reasonable police officer would have believed that he could simply decide to enforce a foreign custody decree and forcibly transfer physical custody from one parent to another without an order from a court in this country..

Thus, the decisions below are at odds with the decisions of this Court and the decisions of federal courts in other Circuits. This Court should granted the Petition to secure uniformity and ensure that children may not be removed from the physical custody of a parent without due process and the supervision of local law enforcement officials by the courts. This is especially critical in the context of enforcement of foreign custody decrees.

Such decisions cannot be made by officers on the beat without judicial supervision and approval.

II. The Issue Of Whether A Child May Be Seized In These Circumstances Consistent With The United States Contitution By Local Police Officers Without Notice Or a Hearing Is An Important Issue Which This Court Should Decide.

Even if there was no split in the Circuits, the issue of whether a child who is seeking asylum in this country can be returned to a foreign country based upon the decision of a local police officer without notice and hearing before a court or any judicial involvement in the process is an issue of national, indeed international, importance that should be decided by this Court. There are many children in the United States who might be subject to the kind of disguised abduction under the color of law that occurred in this case. If police officers are authorized to seize children merely upon the filing by private parties of a document that purports to be a foreign court order without having the validity and enforceability of that order determined, after notice and a hearing, in a court of law, children, especially refugee children, will be vulnerable to kidnaping with the cooperation of local law enforcement agencies.

This Court should take this case to eliminate any doubt that before a child is seized and returned to a foreign country, as occurred in this case, officers must ensure that the parent with physical custody over the child is given notice and a hearing and that courts and not police officers make the crucial determinations about the validity and enforceability of the foreign decree's before they are used as the basis for the seizure of

children, as occurred in this tragic case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted.

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Dated: October 20, 2000

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 98-56707
D.C. NO. CV-95-01025-ABC

LAURIANE KAMAL, ET AL.

VERSES

CITY OF SANTA MONICA, ET AL.

MEMORANDUM[1]

1

This Disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3

The various parties have appealed and cross-appealed. Because the facts and the history of the proceedings are well known to all the parties, we do not recite them here.

1. Appellants contend that the district court erred in denying their procedural and substantive due process claims. We do not reach the merits of the constitutional claims. Qualified immunity shields government officials performing discretionary duties from civil damage suits unless their conduct violates "clearly established constitutional rights of which a reasonable person would have known." Harlow v. PFitzgerald, 457 U.S. 800, 818 (1982). Here, the police officers were in possession of a French court order that had been registered in accordance with California law in a California state court. In the course of determining what actions to take, the officers had been told by the deputy district attorney that the order was enforceable. Given these facts, we cannot conclude that a reasonable officer could not have believed his conduct was lawful.

2. We also affirm the district court's decision with respect to the accompanying state negligence claims for the reasons stated by the district court.

3. Appellants next contend that the district court erred in limiting the evidence they were allowed to present. Evidentiary rulings are reviewed under an abuse of discretion standard. Gilbrook v. City of Westminster, 177 F.3d. 839, 858 (9th Cir. 1999).

The claims which were presented at trial were the warrantless forced entry and arrests. The district court excluded evidence of Lauriane's abuse at the hands of her mother. It did, however, allow evidence of the officers'

knowledge of the allegations of abuse. Given the nature of the issues before the fact-finder and in view of the second ruling, the first was not erroneous. The court also excluded evidence of the distress caused Kamal by Lauriane's separation from him. Here, Kamal's claim is properly divided into two parts: Kamal's initial separation from Lauriane which was clearly the direct result of the officers' entry and arrest; and Kamal's permanent separation from Lauriane as a result of her mother's abduction of Lauriane in the face of a valid TRO. The district court excluded evidence going to the second part. The validity of that ruling depends entirely upon the question of proximate cause.[2] Given the intervening chain of events, we cannot say that the district court abused its discretion in excluding the disputed evidence.

Finally, the district court imposed limitation on evidence relating to post-seizure events and court proceedings. We cannot conclude that the district court abused its discretion in so doing, particularly where, as here, the case was a complicated one and the core issues were what the officers

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In Section 1983 cases, damages may lie for all injuries proximately caused by false arrest or incarceration; those injuries may include psychological injury or the loss of a job opportunity. Smiddy v. Varney, 665 F.2d. 261, 268 (9th Cir. 1981); see Borunda v. Richmond, 885 F.2d. 1384, 1389 (9th Cir. 1989) (noting that a plaintiff may be entitled to compensation for economic harm, pain and suffering, and mental and emotional distress that results from the violations). Similarly, under California law, a plaintiff may recover damages for a false arrest for all injuries proximately caused by that arrest. Valentin v. Superior Court, 78 Cal.App.4th 212, 223 (Ct.App. 2000).

knew both before and during the events at issue.

4. The district court also dismissed Lauriane Kamal's claims for failure to appear at her deposition. On appeal, the Kamals argue that the district court erred in so doing. The district court found that Lauriane's failure to attend a noticed deposition warranted dismissal and concluded that "because Lauriane has not been present in the United States since June 1994, the Court finds that no less drastic sanctions are available to compel Lauriane's compliance with any discovery orders." Moreover, the district court noted that Lauriane might never be able to participate effectively in the lawsuit and that her absence was potentially deeply prejudicial. Given the circumstances of this case, the district court did not err in prohibiting Lauriane's further participation in this suit and dismissing her claim. However, in view of the facts that her father's standing to bring claims on Lauriane's behalf had not been determined and that Lauriane's presence or absence at the deposition was beyond her or her father's control, the court's order does not serve to preclude Lauriane from filing any future action relating to the subject matter of the complaint.

5. Appellants also argue that their claims pursuant to the Alien Tort Claims Act, 28 U.S.C.A § 1350, regarding alleged violations of the right to seek asylum were improperly dismissed. Although Lauriane might be able to assert such a claim, Kamal is not.[3] In light of our holding that Lauriane's dismissal was proper, we need not reach this issue.

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While Kamal had filed an asylum application on behalf of himself as well as Lauriane, his arrest in no way interfered with his ability to pursue his own application.

6. Appellants also argue that the City of Los Angeles and its officers owed them a duty to prevent harm after they assumed custody of Lauriane and that, as a result, the district court erred in granting the City's motion for dismissal. In their complaint, the plaintiffs alleged that the officers' fault lay in the fact that they failed to take Lauriane into protective custody. However, as the district court correctly pointed out, the officers were under no legal duty to do so. Accordingly, we affirm the district court.[4]

7. Appellants also contest the dismissal of the Republic of France pursuant to FRCP 12(b)(1) and (2). In so ruling, the district court concluded that it did not have jurisdiction under the FSIA, and that there was no evidence of waiver – either express or implied. Equally important, it concluded that the acts in question fell within the discretionary function defense.[5] In Risk v. Halvorsen, 936 F.2d. 393, 395 (9th Cir. 1991), this court found that the issuance of travel documents and funds, as well as the shielding of a Norwegian citizen and her children from contact with her husband and their father, constituted the exercise of just such a discretionary function. Risk, 936 F.2d.

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Moreover, given the fact that the complaint in question was the third amended complaint, the district court did not err by not allowing the Kamals leave to amend.

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The FSIA provides that liability does not exist with respect to claims that are based upon the exercise of a discretionary function. 28 U.S.C.A. § 1605(a)(5)(A). Whether a discretionary function is involved is analyzed under the same general principles that govern claims brought under the Federal Tort Claims Act. Liu v. Republic of China, 892 F.2d. 1419, 1431 (9th Cir. 1989).

at 936-37. In this case, French officials were present at the incident during which Lauriane was seized, but the record does not reflect that they were doing anything more than providing translation assistance pursuant to their consular functions.[6] Accordingly, we find that the district court did not err in determining that there was no subject matter jurisdiction with respect to the claims against France.

8. On cross-appeal, Officer Smith argues that the district court erred in granting judgment as a matter of law against him on the issue of his warrantless entry into the Kamals' home and that he was entitled to qualified immunity. In reaching its holding, the district court found that no exigent circumstances or hot pursuit justified Smith's warrantless entry. As a result, the court determined that the entry necessarily made the subsequent arrests unlawful. Even viewing the evidence in the light most favorable to Smith, the district court did not err. Unless officers have probable cause and are presented with exigent circumstances, it is clearly established that the Fourth Amendment prohibits police officers from making a warrantless entry into a person's home. Lalonde v. County of Riverside, 2000 WL 217552, *4 (2000) (collecting cases). In this case, Smith admitted that he had no reason to think Kamal would hurt his own daughter aside from Smith's training which suggested that desperate parents might sometimes hold their children hostage. This is insufficient to establish exigent circumstances, and the illegality of the conduct in question would have been apparent to any reasonable officer. Accordingly, we find that the district court

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Moreover, it does not appear that France waived its immunity by virtue of the presence of some of its consular officials outside the Kamals' home on the day of the seizure.

did not err in finding that no exigent circumstances justified the entry and subsequent arrest, and that Smith was not entitled to qualified immunity.

9. On cross-appeal, Officers Smith and Tapia also argue that the district court erred by awarding duplicative damages for the same arrest under both the federal and state arrest claims. They argue in favor of a rule that a damages award may not stand where a jury awards the same damages for each claim, federal and state, based on one indivisible injury. However, Smith and Tapia failed to object to the award at a time when the jury could have resolved the issue or modified the verdict. Moreover, they have not carried their burden of showing that the damages were in fact duplicative. We see no basis for overturning the district court's judgment that the verdict represented a desire on the part of the jurors to split the damages between the two causes of action, and that it was in fact not duplicative.

10. Appellants also argue that the district court erred in denying Kamal-Griffin's application for attorney's fees because she was also a plaintiff in the case.[7] Although, as appellees admit, a relative of a plaintiff is not barred by Kay v. Ehrler, 499 U.S. 432 (1991), from recovering attorney's fees for representing the plaintiff, we conclude that the district court did not abuse its discretion in denying attorney's fees to Kamal-

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The grant or denial of attorneys' fees pursuant to 42 U.S.C. § 1988 is reviewed for an abuse of discretion. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Gilbrook v. City of Westminster, 177 F.3d. 839, 875 (9th Cir. 1999)

Griffin, given all of the circumstances of this particular case.[8]

AFFIRMED.

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[8] In a recent case, the First Circuit held that Kay did not preclude recovery of fees by an attorney who was both plaintiff and counsel where he was not the only plaintiff and where the fees incurred by the plaintiffs would be essentially the same, whether or not the attorney in question was also a plaintiff. Schneider v. Colegio de Abogados de Puerto Rico, 187 F.3d. 30 (1st Cir. 1999). This decision, however, does not require the award of fees in circumstances such as those present here.

APPENDIX B

APPENDIX B
Kamal Christian KAMAL, et al.
V.
City of Santa Monica, et al.
No. 95-1025
File March 9, 1998
Entered March 11, 1998

Plaintiffs' Motion for Partial Summary Judgment or, in the Alternative, for summary Adjudication of Issues and Defendants' Motion for summary Judgment/Partial Summary Judgment came on regularly for hearing before this court on November 24, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that plaintiffs' motion is DENIED. It is further ORDERED that Defendants' Motion is GRANTED in part, and DENIED in part.

I. Factual Background

This case arises from a French divorce and child custody dispute involving Plaintiff Karim Kamal ("Kamal"), Defendant Marie Pierre Guyot, and their daughter Lauriane. The relevant facts are as follows:

A French court entered a divorce decree for Guyot and Kamal. The decree awarded Guyot and Kamal joint custody, residence with Guyot, and visitation rights to Kamal. The decree further stated that neither parent could move Lauriane from the European Community Territories. Defs.' Request for Judicial Notice, Exh. 2, at 24.

Kamal brought Lauriane to the United States. Guyot then retained Defendant attorney Aeliot Boswell. Boswell filed a

certified copy of the French custody decrees. Defs'. Mot. Exh. A. Boswell also registered the French custody decree and filed a translated copy of the decree with the Los Angeles Superior Court. Defs.' Mot., Exhs. B & C.

Guyot also retained Defendant Orendorff, an investigator, to help locate Lauriane. Orendorff contracted the Santa Monica Police Department and provided Santa Monica Police Defective Smith with information that Kamal had violated a French custody order by removing his daughter from France. Declaration of Detective Michael Smith, ¶¶ 3-4. Orendorff also told Detective Smith that the child was possibly in Santa Monica. Smith Decl., ¶ 4. Orendorff provided Detective Smith with copies of the certified and registered Los Angeles Superior Court papers, including a translation of the June 1993 French custody order. smith Decl., ¶ 4.

Detective Smith then contacted Boswell who confirmed that she had been retained by Guyot and that she had certified and registered the French custody order with the Superior Court. Smith Decl.¶ 5. Boswell old Detective Smith that the order was valid and enforceable in California because it had been certified and registered. Smith Decl., ¶ 5.

Detective Smith reviewed the documents he received and read various provisions of the California Penal and Family Codes. Smith Decl., ¶ 6. Detective Smith states that he also spoke with Deputy District Attorney Robert Budman of the Los Angeles County District Attorney's Child Abduction Unit. Smith Decl., ¶ 7. According to Detective Smith, Budman confirmed that the certified and registered French order was enforceable. Detective Smith also states that Budman told him that he could rely on information provided by

Boswell as being the current state of the law. Smith Decl., ¶ 7.[9]

Detective Smith also contacted the United States Attorney's office and confirmed that there was an arrest warrant for Kamal, although no action had been taken on the warrant Smith Decl., ¶ 8. Detective Smith also went to the Superior Court and verified that the custody order had been registered. Detective Smith also confirmed that Kamal had filed no case on behalf of Kamal or the child. Smith Decl., ¶ 9.

On June 17, 1994, Detective Smith learned that Lauriane's mother was arriving from France and arranged to meet with her on June 21, 1994. Smith Decl., ¶ 11. Before that meeting, Detective Smith learned that Orendorff had spotted Lauriane at the Kamal-Griffin residence. Smith Decl., ¶ 11, On the morning of June 21, 1994 Boswell, Lauriane's mother, Lauriane's grandmother, Orendorff, and a French Consular official, met Detective Smith at the police station. Smith Decl.¶ 13. Detective Smith thus determined that it would be an opportune time to enforce the custody decree. Smith Decl., ¶ 12.

Detective Smith Sgt. Tapia, and uniformed officer Kathy Brock went to the home of Kamal's sister, Dalila Kamal-Griffin. Detective Smith and Tapia knocked on the front door. Smith Decl., ¶ 16. Detective Smith heard voices but received no answer. Smith Decl., ¶ 16. Detective Smith then walked onto the property by walking along the side of the house toward the

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Deputy District Attorney Budman states that he has no specific recollection of speaking with Detective Smith. Deposition of Robert Budman, at 16-17. Budman confirmed, however, that the comments attributed to him by Detective Smith "very well could have happened." Id., at 18

backyard. Smith Decl., ¶ 17.

The parties sharply dispute what happened next. Defendants contend that Detective Smith saw Kamal leaving the residence with Lauriane. Smith Decl.,¶ 717. Defendants contend that Detective Smith identified himself as a police officer, held out his badge, and told Kamal that he wanted to speak with him. Defendants also contend that Kamal disregarded Smith's request and re-entered the house. Detective Smith then followed Kamal into the house. Smith Decl., ¶ 18. Plaintiffs,[10] on the other hand, contend that Kamal was inside the house at a table near the back door when Detective Smith entered the home unannounced. Kamal Decl., ¶ 5; Kamal-Griffin Decl. ¶¶ 5, 17.

The Parties also dispute what transpired after Detective Smith entered the house. It is undisputed, however, that Detective Smith took custody of Lauriane and returned her to Guyot who was waiting at the scene. Detective Smith then arrested Kamal and Kamal-Griffin. Kamal Dec. ¶¶ 4-6; Kamal-Griffin Decl. ¶¶ 17, 18. Guyot and Lauriane returned to France. Plaintiffs have had no contact with Lauriane since June 21, 1994. Kamal Decl. ¶¶ 8; Kamal-Griffin Decl., ¶ 27.

II. Procedural Background

The remaining claims for relief alleged in Plaintiffs' Third Amended Complaint are as follows: first (unlawful search and seizure under § 1983; second (excessive force under § 1983);

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10 "Plaintiffs" refers to KAMAL, LAURIANE KAMAL, by and through her Guardian Ad Litem and Father, KARIM KAMAL, DALILA KAMAL-GRIFFIN, and ROBERT GRIFFIN.

third (false arrest under § 1983); fourth (violation of substantive due process under § 1983); fifth (violation of procedural due process under § 1983); ninth (assault); tenth (battery); twelfth (false arrest and false imprisonment); and thirteenth (negligence). The remaining Defendants in this action are: the City of Santa Monica, Chief of Police James T. Butts, Jr., Detective Smith, Sgt. Tapia, and Office Brock.[11]

On September 26, 1997, Plaintiffs filed a motion for partial summary judgment, or, in the alternative, for summary adjudication of issues. Specifically, Plaintiffs seek summary judgment against Defective Smith and Sgt. Tapia on the first (unlawful search and seizure) and fifth (procedural due process) claims for relief. Plaintiffs also seek summary adjudication that Detective Smith and Sgt. Tapia are not entitled to qualified immunity on Plaintiffs' first and fifth claims for relief. Finally, Plaintiffs seek a ruling that no exception to the Fourth Amendment's warrant requirement existed and that the French divorce decr4ee was not enforceable with a further order from a California court. Defendants filed their Opposition on October 14, 1997. On November 17, j1997, Defendants filed their Reply.

On September 25, 1997, Defendants filed their own motion for partial summary judgment. All Defendants seek summary judgment against: (1) Plaintiff Lauriane's entire

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The Third Amended Complaint alleges claims for relief against Boswell, Orendorff, Guyot, and Lauriane's grandmother, Toche-Halbron. The Court notes, however, that neither Guyot nor Toche-Halbron have been served with the Third Amended Complaint or have appeared in this action. The Court also notes that the parties have stipulated to the dismissal of Boswell and Orendorff.

complaint for failing to cooperate during discovery; and (2) Plaintiffs' entire complaint against Chief of Police Butts.[12] The City of Santa Monica seeks summary judgment against Plaintiffs' fourth (substantive due process) and fifth (procedural due process) claims for relief.[13] Finally, Detective Smith, Sgt. Tapia, and Officer Brock seek summary judgment against Plaintiffs' fourth, fifth and thirteenth (negligence) claims for relief. Plaintiffs filed their Opposition on October 14, 1997. On November 17, 1997, Defendants filed their Reply

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Plaintiffs concede that Butts should be dismissed as a party. Plfs., Opp. at 27. Thus, the Court GRANTS Defendants' motion for summary judgment with respect to Butts.

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Although Defendant City of Santa Monica has moved for summary judgment, the scope of its motion is unclear. Compare Defs.' Mot., at 10 ("Defendant CITY OF SANTA MONICA seeks judgment against Plaintiffs on the first through fifth and thirteenth claims for relief because plaintiff cannot established Municipal liability under § 1983 or a negligence claim.") with id., at 36 9"[T]he City of Santa Monica is entitled to Summary Judgment on plaintiffs' entire complaint.") The City's argument, however, relates solely to Plaintiffs; fourth and fifth claims for relief. There is no discussion of Monell liability attributable to the allegations of Plaintiffs's first (unlawful search and seizure), second (excessive force), or third (false arrest) claims for relief. Plaintiffs' Opposition, in turn understandably restricts its arguments to the fourth and fifth claims for relief. For this reason, the Court determines that the City's summary judgment motion relates solely to Plaintiff's fourth and fifth claims for relief.

At the hearing on this matter, the Court requested that both parties file supplemental briefs relating to the appropriate procedure a police office must follow to enforce a child custody order. On December 3, 1997, the parties simultaneously filed supplemental briefs.

III. Discussion

1. Summary Judgment Standard

It is the burden of the party who moves for summary judgment to establish that there is "no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Red. R. Civ. P. 56(c); British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978). If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the moving party must make a shooing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. SCHWARZER, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984) This means that , if the moving party has the burden of proof at trial, that party must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in that party's favor. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). Furthermore, the court must view the evidence presented to establish these elements "through the prism of the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

If the opponent has the burden of proof at trial, then the moving party has no burden to negate the opponent's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In other

words, the moving party does not have the burden to produce any evidence showing the absence of a genuine issue of material fact. Id. at 325. "Instead, . . .the burden on the moving party may be discharged by 'showing'– that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id.

One the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings ... [T]he adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trail." fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. Celotex, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." Anderson, 477 U.S. at 252. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Id. at 248

B. Analysis

1. PLAINTIFFS' SUMMARY JUDGMENT MOTION

a. Plaintiffs' First Claim for Relief: Unlawful Search and Seizure

Plaintiffs' first claim for relief alleges that Defendants Smith, Tapia, and Brock "[without consent or a search warrant ..." unlawfully entered Plaintiff's home." Third Am Cmplt., ¶36.

Plaintiffs contend that the Defendants did not have probable cause to arrest Kamal. Plfs., Reply, at 19, 25-27. Plaintiffs further contend that even if the Defendants had probable cause, no exigent circumstances existed to justify Defendants' warrant less search and seizure.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures." A warrantless seizure "carried out in a private residence is presumptively unreasonable." Murdock v. Stout, 54 F.3d 1437, 1440 (9th Cir. 1995). "Police entry into a house without a warrant is not however, always unreasonable." Id. In some instances, "exigent circumstances" may exist such that warrantless entry is reasonable Id.

Although exigent circumstances relieve the officer of the obligation of obtaining a warrant, they do not relieve the office of the need to have probable cause to enter the house. Murdork, 54 F.3d at 1441; see also United States v. Winsor, 846 F.2d 1569, 1571 (9th Cir. 1988) ("'Hot pursuit may excuse police from the Fourth Amendment's warrant requirement, but never does it excuse the absence of the requisite degree of suspicion before effecting a search.'") (quoting United States v. Winsor, 816 F. 2.d 1394, 1396 (9th Cir. 1987)). to determine whether an officer had probable cause depends on the "totality of the circumstances known to the officers at the time they entered." Id. "Probable cause requires only a fair probability or substantial chance of criminal activity, not an actual showing that such activity occurred." Id. Thus, before the Court can determine whether an

exception to the warrant requirement exists, it must first determine whether the officers had probable cause to enter the house.

In this case, viewing the evidence in the light most favorable to the Defendants, the record reflects that following: Detective Smith possessed a valid foreign custody decree which precluded Plaintiff from removing Lauriane from the European Economic Territory. Detective Smith learned that Orendorff had spotted Lauriane at the Kamal-Griff residence The Defendants went to the Kamal-Griffin's home where Detective Smith and Sgt. Tapia knocked on the front door. Detective Smith heard voices, but received no answer. Defective Smith then walked from the front of a house toward the alley on a common walkway between the house and some apartment units. Detective Smith saw Kamal, who had an anxious look on his face, exit the residence clutching Lauriane in his arms. Detective Smith held out his badge, identified himself as a police officer, and told Kamal that he wanted to speak with him. Kamal disregarded Detective Smith's request, stated, "no, no" and reentered the house. Detective Smith then followed Kamal into the residence where the officers arrested Kamal and Kamal-Griffin and seized Lauriane.

Based on the totality of the circumstances" known to the Defendants at the time, the Court finds that two statutory provisions-California Penal Code §§ 148[14] and 278.5[15] provided the officers with probable cause to arrest Kamal. [16] Thus, recognizing the conflict between Plaintiffs' and Defendants' view of the facts, the Court finds that Defendants have created a genuine issue of material fact as to whether they had probable cause to arrest Kamal under with § 148 or § 278.5. [17] See also

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Section 148(a) authorizes imprisonment for any "person who willfully resists, delays, or obstructs any public officer [or] peace officer ... in but his discharge or attempt to discharge any duty of his or her office or employment ..." Ca. Penal Code § 148)a)

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Section 278.5(a) authorizes imprisonment for any "person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation ...." Ca. Penal Code § 278.5(a).

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California Penal Code § 836 allows a peace office to effectuate an arrest when a person has committed a felony or when the officer has reasonable cause to believe that the person has committed a felony, regardless of whether a felony has actually been committed. Cal. Penal Code § 836(a).

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Plaintiffs note that "Defendant Smith testified unequivocally that he was not enforcing Penal Code Section 278.5 and 270." Plfs. Reply at 21. This claim is without merit. The Supreme Court has stated that in evaluating allege Fourth Amendment violations, courts must undertake "an objective assessment of an officer's actions in light of the fact and

David Peery Decl., ¶ 14 (noting that if a person fails to voluntarily comply with the officers then, depending on the circumstances, the officers may have probable cause to arrest).

Plaintiffs argue that under California Family Code ¶ 290, the Dependants could not enforce the foreign custody decree without first obtaining an order from a California court. [18] See Plfs.' Supp. Brief at 3 ("There appears to be no other basis under California law [–other than § 290–] to enforce custody decrees.") Thus, Plaintiffs appear to argue that the Defendants did not have probable cause to arrest Kamal because they could not find that Kamal violated the custody decree. See Plfs.' Supp. Brief at 10 ("[T]he absence of recognition of a foreign judgment by a court of California would preclude enforcement of the decree by the Court and its executions by police officers.")

Plaintiffs' claim ignores, however, that even if § 290

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circumstances then known to him." Scott v. United States, 4365 U.S. 128, 137 (1978). "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, view objectively, justify that action." Id. at 138. For this reason, the Court considers the objective facts and circumstances confronting the officers in this case rather than the officers' subjective justifications for their actions.

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Section 290 provides: "A judgment or order made or entered pursuant teethes code may be enforced by the court by execution, the appointment of a receiver, or contempt, or by such other order as the court in its discretion determines from time to time to be necessary." Cal. Fam Code §290.

provided the sole means to enforce a custody decree, circumstances which developed during the incident supported probable cause under other statutory provisions. Thus, based on Defendants' version of the facts and the totality of the circumstances known to the Defendants at the time, the Court finds that Defendants had probable cause to arrest Kamal and entered Kamal-Griffin's home

Plaintiffs contend that even if the Defendant s had probable cause to arrest Kamal, no exigent circumstances existed to justify Defendants' warrantless entry into Kamal-Griffin's home Despite Plaintiffs' invitation to the Court to rule in their favor based on their recitation of Defendants' version of the facts, Defendants in fact dispute the Plaintiffs' recitation of Defendants' facts. The factual scenario therefore remains disputed and open to interpretation. In short, because Defendants have created a factual issue as to how and why the officers entered the home, see Defs.' Opposition at 15-16, the Court cannot resolve whether exigent circumstances or "hot pursuit" created an exception to the warrant requirement.[19] Therefore, the

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In this case, Dependants contend that they were entitled to enter Kamal-Griffins home without a warrant based on: (1) "hot pursuit," see United States v. Santana, U.S. 38-43 (1976) ("[A] suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper .... the expedient of escaping to a private place."); and (2) exigent circumstances. See United States v. Lai, 944 F.2d 1434, 1441 (9th Cir. 1991) (defining exigent circumstances as "those circumstances that would cause a reasonable person to believe that entry ... was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence

Court declines Plaintiffs' request to rule that no exception to the Fourth Amendment's warrant requirement exists.

b. Plaintiffs Fifth Claim for Relief: Procedural Due Process

In addition to moving for summary judgement on their first claim for relief, Plaintiffs have moved for summary judgment on their fifth claim for relief. Plaintiffs' fifth claim for relief alleges that

Defendants' seizure of Lauriane interfered with Plaintiffs' procedural due process rights. Specifically, Plaintiffs allege: "By abducting Lauriane and physically enforcing the French custody decree, said Defendants deprived Plaintiffs Lauriane and Karim Kamal [of] the opportunity to challenge the validity of the French decree." Third Am. Cmplt., ¶ 52. Plaintiffs also allege that "[h]ad Plaintiff Kamal had the opportunity to challenge the validity of the French decree, he would have demonstrated that the decree was obtained and issued by fraudulent means." Id.

Plaintiffs are not entitled to summary judgment on this claim for two reasons. First, Kamal was only entitled to notice and an opportunity to be heard before ea California court made any decree. Because no California court made a decree, Kamal had no right to prior notice. Second, Kamal has already received notice and an opportunity to be heard by the French Court that issued the initial custody decree.

California has adopted the Uniform Child Custody Jurisdiction Act (the "Act"), Cal. Fam. Code § 3400. In re

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improperly frustrating legitimate law enforcement") (quotations omitted).

Stephanie M., 7 Cal. 4th 295, 309 (1994). The Act governs the enforcement of foreign custody decrees. In re Marriage of Malak, 182 Cal. App. 32d 1018, 1025 (1986) (citing former Civil Code §§ 5150-5174). "the Act deals with a state court's determination of subject matter jurisdiction over the custody of children as the issue might arise vis-a-vis another state and with the recognition and enforcement of the decrees of other states." Id. The Act's purposes are to:

> (1) Avoid jurisdiction competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well being.
>
> (2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the
> child.
>
> (3) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and the child's family have the closest connection and where significant evidence concerning the child's care, protection, training, and personal relationships is not readily available, and that courts of this state decline the exercise of jurisdiction when the child and the child's family have a closer connection with another state.
>
> (4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family

relationships for the child.

(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

(6) Avoid relitigation of custody decisions of other states in this state insofar as feasible.

(7) Facilitate the enforcement of custody decrees of other states.

(8) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerning with the child.

Ca. Fam. Code § 3401

The Act applies "to custody disputes and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected person." Cal. Fam. Code § 3 404

Section 3413 states:

The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory prevision substantially in accordance with this paren. or which was made under factual circumstances meeting the jurisdictional standards of this part, so long as

> this decree has not been modified in accordance with jurisdictional standards substantially similar to those of the part.

The Act has international application. In re Marriage of Malak, 182 Cal. App. 3d at 1025. the Act provides that:

> The provisions of this part relating to the recognition and enforcement of custody decrees of other states apply to custody decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

Cal. Fam. Code § 3424 (emphasis added).

Plaintiffs cite to § 3404 to contend that Kamal was entitled to notice and opportunity to be heard before the officers enforced the French custody dec4reee against him and took Lauriane. Plaintiffs' reliance on this prevision is misplaced.

Section 3404 provides in part: "Before making a decree under this part, reasonable notice and opportunity to be heard shall be gi en to the contestants, any parent whose parental right have not been previously terminated, and any person who has physical custody of the child." Cal. Fam. Code § 3404.

Section 3413 states:

> The courts of this state shall recognized and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions

> substantially in accordance with this part or which was made under factual circumstances meeting the jurisdictional standards of this court, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this part

The Act has international application. In Re Marriage of Malak, 182 Cal. App. 3d at 1025. This Act provides that:

> The provisions of this part relating to the recognition of and enforcement of custody decrees of other states apply to custody decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

Cal. Fam. Code § 3423 (emphasis added)

Plaintiffs cite to § 3404 to contend that Kamal was entitled to notice and opportunity to be heard before the officers enforced the French custody decree against him and took Lauriane. Plaintiffs' reliance on this provision is misplaced.

Second 3404 provides in part: "Before making a decree under this part, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have explicitly not been previously terminated, and any person who has physical custody of the child." Cal. Fam. Code § 3404. Section states that "[b]efore making a decree" notice and opportunity to be heard shall be given. This provision is inapplicable to the present situation. In this case, no California court "made" any decree with respect to Lauriane's custody.

Consequently, Kamal was not entitled to any notice and opportunity to be heard under § 3404

To the extent Plaintiffs contend that Kamal was denied notice and an opportunity to be heard in the French proceedings, the undisputed evidence demonstrates that Kamal did receive such notice and opportunity. The French court rendered the judgment "after full argument on both sides, upon first resort, upon merits." Moreover, the French custody decree states that Kamal was represented by counsel, Maitre R. Benarroush. Kamal's declaration further supports a finding that he received notice and an opportunity to b e heard in the French proceedings. Kamal states, "I was present throughout the divorce proceedings and participated [at] each hearing. Plfs.' Opp., Kamal Decl. ¶ 22. Kamal also states that the French court granted Kamal joint legal custody and visitation rights. Plfs.' Opp., Kamal Decl., ¶ 30. finally, Kamal states that he "moved the Family Court of Nice for modification, reconsideration or correction of the judgment." Plfs.' Opp., Kamal Decl. ¶ 326. Kamal also initiated proceedings with the French Juvenile Court. Plfs.' Opp. Kamal Decl. ¶ 38.

As § 3424 states, the Act recognizes and enforces foreign custody decrees "if reasonable notice and opportunity to be heard were given to all affected persons." Cal. Fam. Code § 3424. In this case, the evidence unequivocally establishes that Kamal received notice and opportunity to be heard in the French proceedings. Thus, the French decree was entitled to "recognition and enforcement" in California. Id.

Plaintiff also relies on Miller v. Superior Court, 22 Cal.3d 923 (1978), In re Marriage of Malak 182 Cal. App. 3d 1018 (1986), and In re Stephanie M., 7 Cal. 4th 295 (1994), to argue that he had a right to notice and an opportunity to be heard. None of these cases supports Plaintiffs' position.

In Miller, the wife departed Australia with her children. The husband served the wife's solicitors, in Australia, with notice of a hearing. [20] The wife failed to attend the hearing and the Australian court issued an order granting custody of the children to her husband. When the wife received personal notice one week later, she took no steps to reopen the Australian proceedings. to appeal, or to seek modification of the order. Id. at 928. The California Supreme Court held that, in such circumstances, notice to counsel of record was not unreasonable. Moreover, the Miller court noted that the Australian court's order only granted the husband custody pending a future hearing to be held in Australia at which the wife had the full right to be heard. Id. at 930.

Similarly, in Malak, the California Court of Appeal held that the trial court should enforce a foreign child custody order because the mother, who challenged the order, had received notice and an opportunity to be heard in the foreign court. Id. at 1025-26 ("Wife was given reasonable notice of the Lebanese proceedings and a reasonable opportunity to be heard prior to entry of the ... decree which husband sought to enforce."). See also In re Stephanie M., 7 Cal. 4th at 313 (finding that Mexican consulate that appeared on behalf of the grandmother in California proceedings had actual notice).

In Miller, the court enforced a foreign decree because the wife had notice and a future opportunity to be heard. In Malak, as in Miller, the wife had reasonable notice and opportunity to be heard. In this case, Kamal had a much greater opportunity to be heard in the French courts than either party in Miller or Malak. Thus, Kamal cannot claim that he has been denied notice and an opportunity to be heard.

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[20]The solicitors had no knowledge of her whereabouts Id. at 927

For these reasons, Plaintiffs have not been deprived of notice and an opportunity to be heard and are not entitled to summary judgment on their procedural due process claims. [21]

C. Qualified Immunity

Plaintiffs request that the Court find that the " constitutional limitations on Defendants' authority to enforce [a foreign custody decree] without further proceedings in a court in this county and their ability to make a warrantless entry into plaintiffs' home to enforce [a custody decree] were plain and unambiguous." Plfs.' Motion at 24. thus, Defendants seek a ruling that Detective Smith and Sgt Tapia are not entitled to qualified immunity as a matter of law with respect to Plaintiffs' first and fifth claims for relief.

"When a law enforcement officer asserts qualified immunity from liability for Fourth Amendment violations, the district court must determine whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful." Act Up! Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993)). "Whether a defendant is entitled to qualified immunity turns on a two party inquiry: '(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have bel9eved the conduct was lawful?'"

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Defendants Smith, Tapia, and Brock have filed a motion for summary judgment on Plaintiffs' fifth claim for relief. The Court GRANTS Defendants' motion for summary judgment as to Plaintiffs' fifth claim for relief for the same reason it denies Plaintiffs' motion: Kamal has not been deprived of notice and opportunity to be heard.

Mackinney v. Neilson, 69 F.3d 1002, 1005 (9th Cir. 1995) (quoting Act Up!, 988 F.21d at 871).

"Qualified immunity protects law enforcement officials who reasonably believe they are acting lawfully in carrying out their duties."

Mackinney, 69 F.3d at 1005. Qualified immunity protects public officials "from undue interference with their duties and from potentially disabling threats of liability." Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982). "The qualified immunity standard gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law." Hunter v. Bryant, 502 U.S. 224, 229 (1991).

The qualified immunity analysis necessarily entails an inquiry into the merits to determine whether the officer violated Plaintiffs' rights. Mackinney, 69 F.3d at 1005. "[T]he plaintiff must show that the particular facts of his case support a claim of clearly established right." Backlund v. Barnhart, 778 F. 2d 1386, 1389 (9th Cir. 1985). Plaintiff bears the burden of proving that the alleged constitutional right is clearly established. Davis v. Scherer, 468 U.S. 183, 197 (1984).

Whether the facts alleged could support a reasonable belief in the existence of probable cause is a question of law to be determined by the court. Act Up!, 988 F.2d at 973. "If a genuine issue of fact exists preventing a determination of qualified immunity at summary judgment, the case must proceed to trial." Id.

Regardless of whether the law underlying Plaintiff's first claim for relief is clearly established, the Court finds that an officer could reasonably believe that reliance on the French

custody decree was lawful. [22] Moreover, disputed factual issues remain as to whether the officers had probable cause to entered the home and whether exigent circumstances exists. See Act Up!, 988 F.2d at 873.

For this reason, the Court denies Plaintiffs' request for a ruling that Detective Smith and Sgt. Tapia are not entitled to qualified immunity as a matter of law with respect to Plaintiffs' first claim for relief.[23]

1. DEFENDANTS SUMMARY JUDGMENT MOTION

a. All Claims for relief Relating to Lauriane

Defendants have moved for summary judgment against Lauriane's entire complaint because she has failed to cooperate with discovery.

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Before enforcing the French custody decree, Detective Smith contacted attorney Boswell who confirmed that it was enforceable in California because it had been certified and registered. Detective Smith also verified that the custody decree had been registered and that Kamal had not filed any action in the matter.

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Because the Court has DENIED Plaintiffs' motion for summary judgment and GRANTED Defendants' motion with respect to Plaintiffs' fifth claim for relief (procedural due process), the Court does not address Plaintiffs' request for a ruling that Detective Smith and Sgt. Tapia are not entitled to qualified immunity as a matter of law.

The City fo Santa Monica noticed Lauriane's deposition for August 18, 1997. Plaintiffs responded that "Lauriane may not be able to attend the deposition because ... she is no longer in Mr. Kamal's physical custody. Thus, it appears very unlikely that she will be here in August 18, 1997." Defs.' Mot., Exh. D at 71. Moreover, Kamal concedes that he has not seen Lauriane since June 1994 and does not presently know her whereabouts.

Federal Rule of Civil Procedure 37(d) provides that the court may make such orders as are just when a party fails to appear for a deposition, after being served with proper notice. Such sanctions may include rendering a judgment by default against the disobedient party. fed. R. Civ. P 37(b) (2)(C). In determining weather dismissal is appropriate, the Court must consider: "'(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket: (3) the risk of prejudice to the Defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.'" In Re Exxon Valdez, 102 F.3d 429, 433 (9th Cir. 1996) (quoting Thompson v. Housing Auth. of City of Los Angeles, 782 F. 2d 829, 831 (9th Cir. 1986)).

In this case, the five factors, taken as a whole, weight in favor of granting Defendant's' motion for summary judgment as to Lauriane's complaint. Lauriane has failed to attend a noticed deposition. She is currently out of the county and has been since 1994. Moreover, Plaintiff Kamal has not seen her since that time and does not know her whereabouts. In such circumstances, the Court does not believe that Lauriane has been or will be an active participant in this suit. Moreover, her participation is critical to allow the Defendants' to defend against the damages claims arising from: (1) her seizure by the officers and return to Guyot; and (2) the serious allegations of sexual abuse since her return.

Although mindful of the public policy favoring

disposition of cases on their merits, the Court finds that the remaining factors warrant summary judgment against Lauriane in this action. Finally, because Lauriane has not been present in the United States since June 1994, the Courts finds that no less drastic sanctions are available to compel Lauriane's compliance with any discovery orders.

For these reasons, the Court grants Defendants' motion for summary judgment against Plaintiff Lauriane's complaint. [24]

b. Plaintiffs' Fourth Claim for Relief: Substantive Due Process

Defendants Smith, Tapia, and Brock have moved for summary judgment against Plaintiffs' fourth claim for relief. Plaintiffs' fourth claim for relief alleges that the Defendants "separated Lauriane from her father and thereby deprive him of the right to parent his child, and her right to her father." Third Am. Cmplt., ¶ 47. [25] In essence, Plaintiffs contend that

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Because the Court grants Defendants' motion for summary judgment against Lauriane, it need not decide the issue of Kamal's standing to represent her.

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Plaintiffs' fourth claim for relief also alleges that Defendants "created a dangerous situation by placing Lauriane in the hands of her alleged abusers and increased her vulnerability to ... harm" Third Am. Cmplt., ¶ 47. Plaintiffs also allege that the Defendants acted with "deliberate indifference to the constitutional and statutory rights of the Plaintiff Lauriane Kamal." Third Am. Cmplt., ¶ 48.

The Court notes, however, that it has granted Defendants' motion for summary judgment as to Lauriane for

Defendants violated Plaintiffs' substantive due process rights by enforcing a French decree that was not legally enforceable.

Section 3416(a) of the Act states in part:

> A certified copy of a custody decree of another state may be filed in the office of the clerk of any superior court of this state. The clerk shall treat the decree in the same manner as a custody decree of the superior court of this state. A custody decree so filed has the same effect an shall be enforced in like manner as a custody decree rendered by a court of this state.

Cal. Fam. Code § 3416. Section 3417 further provides that "[i]f the clerk of each superior court shall maintain a registry in which the clerk shall enter ..l. [c]ertified copies of custody decree of other states received for filing ..." Id. § 3417.

In this case, as discussed above, Kamal received notice and an opportunity to be heard in the French divorce proceedings. It is also undisputed that Defendants filed a certified copy of the French decree in Los Angeles County Superior Court. Thus, Defendants had a decree that was enforceable in the same manner

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all claims for relief. Thus, Lauriane is no longer a party to this action. The only alleged violation contained in Plaintiffs' fourth claim for relief which involves a party other than Lauriane is based on the alleged deprivation of Kamal's "right to parent his child." Third Am. Cmplt., ¶ 47. for this reason, the court only address its Order with respect to that allegation and does not consider the allegations that the Defendants "created a dangerous situation ... and increased [Lauriane's] vulnerability to ... harm." Third Am. Cmplt., ¶ 47.

as a California court decree. "A certified copy of a custody decree of another states which meets the jurisdictional standards of the Act may be filed with the clerk of any su0erior court in California and when so filed must be enforced in like manner as a custody decree of this state." In re Marriage of Malak, 182 cal. App. 3d at 1025 (emphasis added) (citing former Civil Code §5164). "[A] custody decree of another nation, if it meets the requirements of [§ 3416–filing] and [§ 3424–notice in the original proceeding], must be given effect in the same manner as a California decree." Id. For these reasons, the Court finds that the Defendants had a valid decree enforceable in the same manner as a California decree.

Plaintiffs contend that before enforcing the decree, Defendants had to initiate contempt of court proce3eddings under Family Code § 290. This contention is without merit. Section 290 provides:

> "A judgment or order made or entered pursuant to this ode may be enforced by the court by execution, the appointment of a receiver, or contempt, or by such other order as the court in its discretion determines from time to time to be necessary." Cal. Fam. Code § 290.[26] Section 290

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Plaintiffs' reliance on In re Marriage of Hopson, 110 Cal. App. 3d 884 (1980), is misplaced. In that case, the California Court of Appeals noted that the "filing of a [foreign] decree with this state does not in and of itself mandate enforcement. Under [§ 3413], the lower court must first determine if the order was made 'substantially in accordance' with the standards of the [Act] before it can be enforced under [§ 3416]." Id. at 893. In Hopson, however, parties sought to

> expressly states that a judgment "may" be enforced in this manner. The section does not, However, require enforcement in this manner. California Penal Code § 279(b), on the other hand, specifically provides that a "child who has been detained or concealed shall be returned." This mandatory language supports the conclusion that § 290 does not provide the sole means for enforcing a custody decree. Thus, the Court finds that the Defendants were entitled to enforce the French decree.

Plaintiffs cite several cases in support of their position that returning Lauriane to her mother violated their rights. These cases are inapposite. in Anderson, 659 F. Supp. at 23-24, the officers, lacking any court order, seized a child. In this case, he officers had a valid enforceable decree. In Smith, 675 F. Supp. at 1307, the court held that officers were not entitled to qualified immunity for assisting "a parent in obtaining custody in violation of a court order." In this case, however, [t]he officers acted consistent with a valid custody order rather than in violation of any cour5t order.

In re Stephanie M., also fails to advance Plaintiffs' position. In that case, the court held that it would not enforce a

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enforce conflicting custody orders. In this case, prior to the Defendants' seizure of Lauriane, Kamal never contested the French decree or obtained another custody order challenging the only pending decree–the French decree that the Defendants filed and registered with the Los Angeles County Superior court. Absent a countervailing custody order or decree, nothing prevented the Defendant in this case from enforcing the French decree.

foreign order because the foreign order was made without notice. In re Sephanie M., 7 Cal. 4th at 315 ("In this case, it appears that the [foreign] order was obtained ex parte, without notice .... Accordingly , it does not appear that the order is entitled to enforcement under Family Code § 3424). In this case, however, the Court has already found that Kamal received notice and an opportunity to be heard with respect to the French divorce decree.

For these reasons, the Court GRANTS Defendants' summary judgment motion with respect to Plaintiffs' fourth claim for relief. [27]

c. Qualified Immunity

Defendants have moved for summary judgment on Plaintiffs' fourth and fifth [28] claims for relief based on qualified

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The Court has granted Defendants' motion for summary judgment with respect to Plaintiffs' fourth and fifth claims for relief. Because Plaintiffs have not established an underlying c0nstitutional violation with respect to those claims, the City cannot be liable. See Alexander v. City & County of San Francisco, 29 F.3d at 1367 (noting that under Monell v. Department of social Servs., 436 U.S. 658, 690 (1978), a municipality may be liable under § 1983 "only if its policy or custom caused [a] constitutional deprivation"). thus, the Court hereby GRANTS the City's motion for summary judgment with respect to Plaintiffs' fourth and fifth claims for relief.

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The Court notes that Defendants' motion fails to present any legal argument with respect to Plaintiffs' fifth claim for relief. Thus, the Court declines to address it

immunity.

As discussed above. "whether a defendant is entitled to qualified immunity turns on a two part inquiry: '(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?'" Mackinney, 69 F.3d at 1005 (quoting Act Up!, 988 F.2d at 871). "Qualified immunity protects law enforcement officials who reasonably believe they are acting lawfully in carrying out their duties." Id.

The Court has determined that the Defendants have not violated Plaintiffs' substantive due process rights with respect to Plaintiffs' fourth claim for relief. The Court has specifically found that the Defendants enforced a valid decree. Even if, however, the Court is incorrect in its analysis, the Court specifically finds that a reasonable officer could have believed that enforcing the foreign decree was lawful.[29]

For these reasons, Defendants are entitled to qualified immunity on Plaintiffs' fourth claim for relief.

d. Negligence

Plaintiffs' thirteenth claim for relief for negligence alleges that defendants " had a duty of care to protect Plaintiffs from injury and harm." third A, Cmplt., ¶ 86.

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qualified immunity analysis to that claim. Nevertheless, the issue is irrelevant because the Court has granted summary judgment in the Defendants' favor on Plaintiffs' fifth claim for relief.

[29] See supra footnote 14.

Whether a duty is owed depends, in part, on the foreseeability of harm to the plaintiffs, the degree of certainty that Plaintiff would suffer injury the closeness of the connection between the Defendant's conduct and the injury suffered, the moral blame attached to the Defendant's conduct, the policy of preventing future harm, the extent of the burden on the Defendant and the consequences to the community of imposing the duty, and the availability, cost, and prevalence of insurance for the risk involved. Rowland v. Christian, 69 Cal. 2d 108 (1987).

The scope of Plaintiffs' thirteenth claim for relief is unclear. To the extent Plaintiffs' thirteenth claim for relief arises from allegations of future harm to Lauriane, those claims are moot because Lauriane has been dismissed from this action. To the extent the claim is based on the enforcement of the French custody decree, the Court has already determined that the Defendants enforced a valid, enforceable order. Thus, the Court finds that Defendants owed Plaintiffs no duty arising from, the enforcement of a valid custody decree.

For this reason, the Court GRANTS Defendants' summary judgment motion as to all Defendants with respect to Plaintiffs' thirteenth claim for relief.

IV. Conclusion

For the aforementioned reasons, the Court hereby DENIES Plaintiffs' Motion for Summary Judgment in its entirety. Defendants' Motion for summary Judgment is GRANTED as to dismissal of all claims against Chief Butts and dismissal of the complaint as brought on behalf of Lauriane. In addition, the Court GRANTS Defendants' motion as to Plaintiffs' fourth, fifth, and thirteenth claims for relief as to all Defendants, including the City.

The Court notes that the following claims for relief remain as to the individual Defendants and the City: The first, second, and third claims for relief alleging § 1983 claims for unlawful search and seizure, excessive force, and unlawful seizure/false arrest, and the ninth, tenth, and twelfth claims for relief, state claims alleging battery, assault, and false imprisonment, respectfully.

SO ORDERED.

DATED: March 9, 1998

/s_____
AUDREY B. COLLINS

UNITED STATES DISTRICT JUDGE

APPENDIX C

APPENDIX C

KARIM CHISTIAN KAMAL et al.,
Plaintiffs,

Number 95-10256

FINAL JUDGMENT

vs.

CITY OF SANTA MONICA, et al.,
Defendants

This action came on for trail before the court and a jury, the Honorable Audrey B. Collins presiding, and the issues having been tried, and the jury having rendered its Special Verdict dated June 30, 1998, on liability and damages, the Court entered final judgment pursuant to Rule 58 as follows:

1. The Court incorporates the jury's Special Verdicts as to defendants Michael Smith and Richard Tapia.

2. Judgment is entered in favor of plaintiff KARIM Kamal against defendant Michael Smith in the total amount of $33,000.00 based upon the Special Verdict in his favor on his federal claims of unlawful search and seizure (unlawful entry) and unlawful arrest and his state law claim of false arrest.

3. Judgment is entered in favor of plaintiff Dalila Kamal-Griffin against defendant Michael Smith in the total amount of $90,000 base upon her federal claims of unlawful search and seizure (unlawful entry) and unlawful arrest and her state law claim of false arrest.

4. Judgment is entered in favor of plaintiff Robert Griffin against defendant Michael Smith n the total amount of $1, 500.00 based upon his claims of unlawful search and seizure (unlawful entry)

5. Judgment is entered in favor of plaintiff KARIM Kamal against defendant Richard Tapia in the total amount of $2,000.00 based upon his federal claim of unlawful arrest and his state claim of false arrest.

6. Judgment is entered in favor of plaintiff Dalila Kamal-Griffin in the total amount of $5,000.00 based upon her federal claim of unlawful arrest and her state claim of false arrest.

7. Judgment is entered in favor of defendant Michael smith against plaintiffs Karim Kamal and Dalila Kamal-Griffin on their claims of excessive force, assault and battered.

8. Judgment is entered in favor of defendant Richard Tapia against plaintiffs Karim Kamal, Dalila Kamal-Griffin and Robert Griffin on their claims of excessive force, assault, battery and search and seizure (unlawful entry).

9. In previous orders, the Court has dismissed defendants' City of Santa Monica, City of Los Angeles, James Butts, Kathy Brock, Gilbert Sabndoval, Elva Bufford, Republic of France, Francois Mitterrand, Alain Juppe, Jean Maurice Rippert, Jerome Champagne, Thierry Zarella, Pierre Mehaigneria, Paul Louis Aumeras, Rene Salomon, Francois Thevenot, Jac queline Alexandre, James Orendorff, Marie-Pierre Guyot, Gilbert Alexandre, Pierrette Toche-Halbron and J.A. Aelliot Boswell. The Court incorporates all of the prior orders dismissing these defendants from th8s action for the reason stated in those orders. This judgment is intended to constitute a complete resolution of all of plaintiffs' complaints in this action.

10. Pursuant to FRCP 54(d)(1), plaintiffs are awarded costs which must be submitted within 20 days of the entry of judgment to be taxed by the clerk.

11. Plaintiffs are the "prevailing" parties pursuant to 42 U.S.C.§1988 and are entitled to an award of attorney's fees. Plaintiffs shall file a motion for attorney's fees within 20 days of the date of entry of judgment.

DATED: August 31, 1998

AUDREY B. COLLINS
UNITED STATES DISTRICT
JUDGE

Prepared by: BOSTWICK & HOFFMAN, LLP

BY_____
Paul L. HOFFMAN
Attorney for Plaintiffs

APPENDIX D

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

KARIM KAMAL, et al.,	No. 98-567070
	D.C. No. CV-95-01025-ABC
Plaintiffs-Appellants	
v.	**ORDER**
CITY OF SANTA MONICA, et al.	
Defendants-Appellants	

Before: REINHARDT and O'SCANNLAIN, Circuit Judged and SCHWARZER, Senior District Judge[30]

Appellants' Petition for rehearing is denied.

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The Honorable William W. Schwarzer, Senior United States District Judge for the North District of California, sitting by designation.